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Securing Tribal Sovereignty: A Theory for Overturning Lone Wolf

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SECURING TRIBAL SOVEREIGNTY: A THEORY FOR OVERTURNING *LONE WOLF**

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The aspect of *Lone Wolf v. Hitchcock*[1] that I want to explore in this essay I will label "congressional unilateralism." By this I mean both the power of Congress to abridge or terminate tribal sovereignty, and also the power to do so in the face of a prior treaty commitment not to change governing relations without the consent of the tribe. *Lone Wolf* remains the Supreme Court's strongest statement upholding congressional unilateralism. I propose a theory for curbing Congress's plenary power, at least as it pertains to constitutive governing arrangements. Specifically, I suggest that "mutual consent" provisions in Indian-United States agreements ought to be viewed as binding, preventing unilateral repeal of treaty commitments by federal statute. If this is right, then *Lone Wolf* is wrong.

I. PLENARY POWER AND CONSTITUTIONAL LIMITS

In an important article, Nell Jessup Newton has suggested a number of constitutional limits that might be imposed on Congress's purported plenary powers to regulate tribes. She reasons that the factors on which the Court has relied to justify "strict scrutiny" in other areas of constitutional law ought to apply with equal force in evaluating federal Indian policies. Among other proposals, she argues that the Fifth Amendment imposes restrictions on congressional power to extinguish aboriginal title and to take title to tribal land held in fee.[2]

The concept of the federal government's trust responsibility toward Indians provides additional grounds for restricting plenary power.[3] Although frequently cited with more contempt than praise (owing to its source in *United States v. Kagama*[4] and other cases now seriously criticized), the trust doctrine arguably puts

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1. 187 U.S. 553 (1903).

2. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 249-61 (1984).

3. *See Felix S. Cohen's Handbook of Federal Indian Law* 221-25 (Rennard Strickland et al. eds., Michie Co. 1982) (citing cases).

4. 118 U.S. 375 (1886).

a burden on Congress to show that its regulation of the tribes advances tribal interests.[5] And the Court has indicated, to mixed reviews,[6] that the trust responsibility can occasionally have constitutional bite.[7]

Subconstitutional norms may also aid in the domestication of plenary power. Indian law posits an array of canons of statutory and treaty interpretation that favors the tribes. For example, the Court reaffirmed in 1999 that "Indian treaties are to be interpreted liberally in favor of the Indians" and that "any ambiguities are to be resolved in their favor."[8] So, too, the Court has required that Congress make clear its intent to abrogate a prior treaty before a statute will be given such effect.[9] Philip Frickey has argued that, like the treaties themselves, these norms have been breached in recent years.[10] But they remain available to jurists interested in producing a kinder and gentler plenary power doctrine. Likewise, the trust doctrine is regularly invoked in aid of statutory interpretation favorable to the tribes and to provide a basis for judicial review of federal administrative power.[11] Christina Wood has made a powerful case for a reinvigorated trust doctrine that would recognize the duty of the federal government to protect native separatism and tribal sovereignty.[12]

Together, these (and other)[13] strategies could be mobilized by the Supreme Court to limit the plenary power doctrine. If successful, it would mean that federal power over Indians would take its place among other federal powers that are "plenary" in the sense that they apply to the entire subject matter but that are not exempt from usual constitutional limits. As applied to congressional regulation of Indian sovereignty, the results of such a move would not be trivial. For example, congressional diminution of reservations or termination of tribes might be challenged as violating constitutional protections of associational rights.

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5. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1508-13; *U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 415-16 (1980); *Lone Wolf*, 187 U.S. at 565-66.

6. *See* Wood, *supra* n. 5, at 1509-11; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109, 117.

7. *See Sioux Nation*, 448 U.S. at 415.

8. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999).

9. *See Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 412 (1968) (the Court, however, has said that there is no duty on Congress to so state on the face of the statute); *U.S. v. Dion*, 476 U.S. 734, 738 (1986).

10. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 418-26 (1993); *but see Mille Lacs*, 526 U.S. at 218 (relying on canons in aid of tribe).

11. *See Felix S. Cohen's Handbook of Federal Indian Law*, *supra* n. 3, at 220-28 (outlining the "trust responsibility").

12. *See generally* Wood, *supra* n. 6.

13. For instance, strategies that incorporate the constitutional protections of association and culture and family could limit the doctrine. *See e.g. Wis. v. Yoder*, 406 U.S. 205 (1972) (First Amendment protection of religion); *Pierce v. Socy. of Sisters*, 268 U.S. 510 (1925) (substantive due process); *Meyer v. Neb.*, 262 U.S. 390 (1923) (substantive due process); *see* Newton, *supra* n. 2, at 264 ("[t]he Court's willingness to protect . . . insular groups from forced homogenization demonstrates that values of cultural diversity may be protected by the Constitution in a proper case"); *but see Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause does not bar a state from criminalizing a tribe's religious use of peyote).

But subjecting congressional exercises of power to constitutional limits may not, in the end, get to the nub of the sovereignty issue. A fully "decolonized"[14] Indian law requires more than limits on federal power. It must secure self-determination in the deeper sense of protecting a tribe's authority to structure its form of government and to choose means to pursue tribally determined ends. As James Anaya has suggested, self-determination for indigenous peoples occurs on two levels: it involves the development and implementation of day-to-day policies that are the normal stuff of government (what Anaya terms *on-going self-determination*) and it also includes decisions on *constitutive* arrangements, such as governmental structure and membership rules.[15]

Exercises of congressional plenary power have historically operated on both levels. While federal action on the day-to-day level may be a significant intrusion on tribal self-determination, it is commonplace in our constitutional structure: federal policies frequently displace state policies regulating private conduct.[16] What is distinct about Indian law is the insecurity of tribal decisions on the constitutive level. Here, Congress has taken actions that would seem truly extraordinary if applied to the states. It has unilaterally reduced the size of reservations (and, correspondingly, the reach of tribal sovereignty), extended civil and criminal jurisdiction over reservations, mandated that constitutions established under the Indian Reorganization Act[17] be agreed to by the secretary of the interior, and required federal administrative approval of tribal contracts and land dispositions. Most remarkably, Congress has simply terminated tribes altogether and dispersed their landholdings.

The Court has given its imprimatur to these actions. The 1979 case of *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*[18] considered the constitutionality of Public Law 280,[19] under which the state of Washington asserted partial criminal and civil jurisdiction over the reservation. The tribe argued that the unilateral imposition of state authority violated its right to self-government and was beyond the power of Congress.[20] The Court quickly disposed of the constitutional claim, finding that the tribe had no "fundamental right" to self-rule that would mandate special judicial protection.[21] It was "well-established," it noted, "that Congress, in the exercise of its plenary power over

14. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993).

15. *See* S. James Anaya, *Indigenous Peoples in International Law* 81-82 (Oxford U. Press 1996).

16. The outcome would be different, however, vis-à-vis states themselves. The federal government must still identify a federal power that justifies the legislation, and we have learned that even the commerce power has its limits. *See U.S. v. Morrison*, 529 U.S. 598 (2000); *U.S. v. Lopez*, 514 U.S. 549 (1995). Regulation of the tribes remains plenary in the sense that Congress is deemed to possess full regulatory power without appeal to any particular delegated power.

17. *See Indian Reorganization Act of 1934*, Pub. L. No. 73-383, §16, 48 Stat. 984, 987 (1934).

18. 439 U.S. 463 (1979).

19. Pub. L. No. 83-280, 67 Stat. 588, 588-90 (1953).

20. *Tribes of the Yakima Indian Nation*, 439 U.S. at 500.

21. *Id.* at 501.

Indian affairs, may restrict the retained sovereign powers of the Indian tribes."[22] Even Justice Marshall's opinion in *Santa Clara Pueblo v. Martinez*,[23] frequently cited as near the apex of pro-sovereignty decisions, makes reference to the legal principle that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[24]

Lone Wolf added insult to injury, holding that not only does Congress have the power to unilaterally abrogate treaty rights, it has the power to do so in violation of a provision requiring tribal consent for such action.[25] The facts in *Lone Wolf* need but brief recitation. Article 12 of the 1868 Treaty of Medicine Lodge[26] between the United States and the Kiowa and Comanche tribes prohibited cessions of reservation land unless approved by three-fourths of adult male tribe members.[27] In 1892, the government secured an agreement that called for the allotment of tribal land, in effect terminating the reservation.[28] Subsequent investigation established that the agreement had been procured by fraud and, despite representations of the federal agent to the contrary, had not been ratified by three-fourths of the tribe.[29] Nonetheless, Congress adopted legislation in 1900 that essentially imposed the agreement on the tribe.[30] Citing doctrine established in the foreign affairs area that subsequent statutes can abrogate prior treaties, the Supreme Court upheld the 1900 legislation.[31] The Court recognized that "of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf," but no legal norm restricted "the legislative power . . . [to] pass laws in conflict with treaties made with the Indians."[32] In any event, said the Court, the claims of fraud could not be inquired into by the Court since such matters were "solely within the domain of the legislative authority, and its action is conclusive upon the courts."[33] "If injury was occasioned" by the 1900 legislation, "relief must be sought by an appeal to . . . [Congress] for redress, and not to the courts."[34] In short, violation of the Treaty of Medicine Lodge was nonjusticiable.

Lone Wolf thus represents plenary power at the meta-level. It permits Congress to change the rules that the tribes and federal government had agreed would govern changes to the tribal-federal relationship—a power denied to the tribes.

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22. *Id.*
23. 436 U.S. 49 (1978).
24. *Id.* at 56.
25. 187 U.S. 553.
26. *The Treaty of Medicine Lodge* (Oct. 21, 1867), 15 Stat 581.
27. *See Lone Wolf*, 187 U.S. at 564.
28. *See Lone Wolf*, 187 U.S. 553.
29. *See id.*
30. *See id.*
31. *See id.* at 566.
32. *Lone Wolf*, 187 U.S. at 566 (citations omitted).
33. *Id.* at 568.
34. *Id.*

Can a constitutional case be made that constitutive aspects of Indian self-determination receive significant protection in the courts; or does Congress, as the plenary power doctrine holds, truly have unfettered discretion to limit, rearrange, and terminate tribal sovereignty?

One of the *Lone Wolf* roadblocks to judicial scrutiny is today out of the way. The Court no longer holds that federal regulations governing the tribes present "political questions" beyond the competence of the courts. In *Delaware Tribal Business Committee v. Weeks*,[35] the Court repudiated *Lone Wolf* on this point, holding that the prior case "has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment."[36]

Assuming, then, that burdens on Indian sovereignty are not wholly immune from judicial scrutiny, the question remains whether such sovereignty receives any substantive protection. Protection might be afforded (1) if tribal sovereignty is a protectable interest secured by the Constitution, or (2) if federal legislation creates a "vested right" whose abridgment would warrant judicial scrutiny of congressional justifications.

II. SELF-GOVERNMENT AS A CONSTITUTIONALLY SECURED INTEREST

As to the first argument, that tribal sovereignty is secured by the Constitution, Russel Barsh and James Henderson have suggested that Indian self-government might be asserted as a fundamental right protected by the Ninth Amendment,[37] and Dean Newton has urged advocates to press the claim that tribal sovereignty is secured under the Due Process Clause's protection of liberty.[38] Under both analyses, the constitutional text cited serves as a placeholder for substantive rights whose source is outside the text.

There are a bundle of constitutional values in self-governance and protection of culture that have been recognized in the Court's cases. The First Amendment's Free Speech Clause protects the associational rights of groups to undertake collective political and cultural action.[39] The Amendment's guarantee of free religious exercise protects dissenting groups that seek to preserve a traditional form of association in the face of state demands for acculturation,[40] and the Due Process Clause has long been understood to protect family decisions on child raising and schooling.[41] To the extent that these cases establish a kind of group

35. 430 U.S. 73 (1977).

36. *Id.* at 84. Furthermore, the Court has backed down from the broadest reading of *Lone Wolf*—that Congress is free to take Indian land so long as it makes some gesture at compensation. *See Sioux Nation*, 448 U.S. 371.

37. Russel L. Barsh & James Y. Henderson, *The Road: Indian Tribes and Political Liberty* 264-67 (U. Cal. Press 1980).

38. *See* Newton, *supra* n. 2, at 261.

39. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

40. *See Yoder*, 406 U.S. 205.

41. *See Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390; Newton, *supra* n. 2, at 264.

privacy right to be free from governmental efforts aimed at "foster[ing] a homogeneous people,"[42] they complement the Court's reconceptualization of the tribes as private, voluntary organizations.[43]

It has been argued that the constitutional values implicit in the cases can be cobbled together to provide protection for tribal self-government.[44] If so, then federal legislation that infringes on sovereignty would presumably receive close judicial scrutiny.[45] The associational rights argument, however, has yet to coalesce for the courts. Constitutional norms might well protect tribes against state laws that seek to regulate religious practices,[46] tribal membership,[47] and decisions regarding the education of children, but that is a long way from a constitutional right to exercise civil and criminal jurisdiction over tribe members and nontribal residents. As the constitutional claims on behalf of the tribes move from the protection of culture to a power of "jurisgenesis,"[48] the Court is likely to grow increasingly concerned.[49]

There is another cluster of constitutional values that may be more fruitfully invoked in a search for principles protecting tribal sovereignty.[50] The Court has, in recent years, provided strong protection for state processes from direct federal regulation.[51] The "commandeering" of state officials for federal duties is held to be an unconstitutional intrusion into local decisionmaking, frustrating local democracy and subverting accountability.[52] The idea that Congress could restructure state governments is well beyond the pale.[53] What is at stake in these cases is not the substantive regulation of matters of local concern; as the Court concedes, Congress retains authority to preempt state regulation of private conduct on most matters. Rather, it is Congress's impact on the structure of local government—that is, infringement on the constitutive level—that concerns the Court. At the core of the federalism cases is a conceptualization of state

42. *Meyer*, 262 U.S. at 402.

43. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

44. *See* Newton, *supra* n. 2, at 236-88.

45. *Id.* at 266.

46. *But see Smith*, 494 U.S. 872.

47. *Compare Dale*, 530 U.S. 640 (invalidating on First Amendment grounds state law requiring Boy Scouts to admit gays as members).

48. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 751 (1989) (adopting term from Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983)).

49. *Cf. Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating affirmative action program adopted by majority-black city council); *Shaw v. Reno*, 509 U.S. 630 (1993) (subjecting to "strict scrutiny" the use of race in drawing election districts).

50. *See* Richard W. Garnett, *Once More into the Maze:* United States v. Lopez, *Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. Rev. 433 (1996); Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Toledo L. Rev. 617 (1994).

51. *See Printz v. U.S.*, 521 U.S. 898 (1997); *Lopez*, 514 U.S. 549; *N.Y. v. U.S.*, 505 U.S. 144 (1992).

52. *See Printz*, 521 U.S. 898; *N.Y.*, 505 U.S. 144.

53. This has been true from early days: *Coyle v. Smith*, 221 U.S. 559 (1911) (federal relocation of state capital prohibited). This limit, however, is not so entrenched in the context of voting. *See e.g. Baker v. Carr*, 369 U.S. 186 (1962).

sovereignty—not as a nonenumerated right of a group of people, but rather as an underlying structural assumption of the constitutional order.[54]

Tribal governing structures are not currently conceived of as part of that order. But it is not hard to see how the justifications for protection of state governments would translate to tribal sovereignty. Tribal sovereignty, like state sovereignty, is neither created by federal delegation nor established by the Constitution. It precedes, and receives recognition in, the Constitution.[55] The pre-established sovereignty of the tribes is reflected in the Commerce Clause, which lists three kinds of political communities that do not owe their existence to ratification of the Constitution: states, foreign nations, and Indian tribes.[56] Tribes may not be foreign nations, for which Congress has no power to regulate internal affairs, but why might they not at least receive the same kind of protection as states—that is, that their structure of government is for their citizens, and not for Congress, to decide?

The values usually associated with federalism—accountability, experimentation, and local diversity—apply in spades to tribal governments. Whatever displacement of local choice occurs through preemptive national legislation, it is far less intrusive than the wholesale restructuring of territory and governance that Congress can impose on the reservations; and whatever merit remains of Herbert Wechsler's description of the political safeguards of federalism,[57] it is hard to argue that the tribes are structurally represented in Congress or in the Electoral College.[58] Furthermore, tribal cultural and political choices contribute at least as much to American diversity as do the activities of states, which appear more and more to be mere local representations of national political and cultural trends.

By analogy to the federalism cases, then, the Court could well hold that constitutive tribal arrangements receive constitutional protection.[59] The received wisdom that Congress has plenary authority to rearrange or extinguish Indian sovereignty would be overturned just as was the post-New Deal assumption that state sovereignty imposed no limits on plenary federal powers. To be sure, this would work a dramatic change in the law. Perhaps Congress would retain power to recognize tribes; but once recognized, tribes would be free to structure their governments as they deem appropriate without federal supervision (short of a

54. *See e.g. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

55. Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 Stan. L Rev. 1311, 1333-35 (1993). "The legitimacy of Indian government is not based on the mere fact that indigenous people were prior occupants of the continent, but on the fact that they were prior sovereigns." *Id.* at 1333.

56. U.S. Const. art. 1, § 8, cl. 3 (Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

57. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 542 (1954).

58. Which is not to say that they do not have power as interest groups lobbying the federal bureaucracy.

59. *See* Clinton, *supra* n. 14, at 124-25.

showing of a compelling federal interest). Accordingly, current statutory provisions requiring approval by the Secretary of the Interior of amendments to tribe constitutions might well be unconstitutional,[60] and because tribal sovereignty is so closely linked with territory, congressional diminution or termination of reservations would not be permissible without tribal consent. So too limitations on tribal criminal jurisdiction would be problematic. Were this the law, legislation of the kind at issue in *Lone Wolf* would be invalid. These conclusions seem radical when applied to Indian law, but imagine how the Court would respond to federal regulation of state constitutions or to federal legislation purporting to decrease the territory of a state.

III. TRIBAL SOVEREIGNTY AS A STATUTE-BASED OR TREATY-BASED INTEREST

In the preceding section, I canvassed arguments that tribal sovereignty is a protectable constitutional interest. An alternative approach would attempt to locate a protectable interest of Indian sovereignty in the federal statutes that affirm the tribes and their governing laws. The analogy here is to the important line of cases holding that federal (and state) laws may create entitlements that cannot be taken away without due process of law.[61]

It is unlikely that statutory recognition of tribal authority alone is enough to establish a "right" to self-governance. Not only does the plenary power doctrine undercut a claim to entitlement to current governance structures, but also, more important, the procedural due process cases establish rights to fair process, not substantive rights to a continuation of the entitlement program.[62] Although Congress cannot mandate that a flip of a coin determines one's eligibility for welfare, it may—as recent history demonstrates—set a time limit on eligibility no matter the harm imposed on the person who loses benefits.

Suppose, however, that Congress sought to guarantee the continuation of tribal sovereignty by stating in legislation that governing arrangements could not subsequently be altered without tribal consent. Would such a guarantee be deemed to create a substantive entitlement to the sovereignty provided in the statute? This is a different version of the question in *Lone Wolf*, which considered whether Congress could take unilateral action in violation of a mutual consent clause in a treaty. But the underlying issue is the same: whether a congressional commitment not to alter governing arrangements of tribes without their consent can bind a subsequent Congress.

The usual constitutional answer is that a sitting Congress may not bind a future Congress. Borrowing language from constitutional debates, it would be said that the first Congress may not *entrench* tribal sovereignty so as to limit a subsequent Congress's power to arrange matters differently (or terminate

60. *See* 25 U.S.C. § 476 (2000).

61. *See Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). *See* Charles A. Reich, *The New Property*, 73 Yale L. J. 733 (1964).

62. *Cf. Dandridge v. Williams*, 397 U.S. 471 (1970).

sovereignty altogether). Julian Eule[63] has grounded the anti-entrenchment principle in the concept of a temporal legislature, elected for a term of years with limited power to control the future (or the past).[64] A Congress that can bind future legislatures, in effect, denies the democratic rights of electors of the subsequent Congress. Permitting entrenchment as an ordinary practice would also likely have disastrous consequences for the congressional process. Members of Congress facing electoral loss would seek to lock in long-term benefits for constituencies, and subsequent Congresses would be under heavy pressure to do the same for their favored groups. The utilitarian arguments against such practices—particularly in a quickly changing world—provide a strong supplement to the democratic theory concerns.[65]

This is a foundational—if generally unexamined—assumption of constitutional law, applied by the Court at the state[66] and federal level.[67] There are, to be sure, recognized exceptions to the principle. Congress may not declare that land granted to a person by a prior Congress shall revert to the federal government, nor may it repeal a contract made by an earlier Congress.[68] The prior acts are deemed to have established vested rights, and infringements of those rights will call forth judicial remedies. Although seen as exceptions to the anti-entrenchment rule, the vested rights cases in fact help define the rule. Many things done by one Congress will affect subsequent Congresses. An aircraft carrier purchased at time *T* cannot be handed back at time *T* plus *1*; wages paid today to government employees are not recallable tomorrow. This is simply the application of a higher-level (constitutional) norm that protects property rights.

Indian law has affirmed this vested right principle to some extent, thereby undercutting a reading of *Lone Wolf* that would permit Congress to take recognized tribal land at will. In the landmark 1980 *United States v. Sioux Nation of Indians*[69] case, the Court held that Congress's taking of the Black Hills in violation of the 1868 Fort Laramie Treaty[70] could be challenged and that compensation was due the tribe because the federal government could not demonstrate that the abrogation of the treaty was an appropriate measure for protecting and advancing tribal interests (a violation of the federal government's trust responsibility).[71] But the Court has shown no general inclination to rethink

63. *See* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379.

64. Limitations on altering past agreements are reflected in constitutional norms disfavoring retroactive application of laws. *See id.* at 441-47.

65. *See id.* at 447-59.

66. *See Stone v. Miss.*, 101 U.S. 814 (1879).

67. *See* Memo. from Teresa Wynn Roseborough, Dep. Asst. Atty. Gen., to Special Representative for Guam Commonwealth, *Mutual Consent Provisions in the Guam Commonwealth Legislation* (July 28, 1994) (copy on file with U.S. Dept. of Justice).

68. This can perhaps be traced to *Dartmouth College v. Woodward*, 17 U.S. 518 (1819). *See* Eule, *supra* n. 63, at 419-24.

69. 448 U.S. 371.

70. *The Treaty of Fort Laramie* (Apr. 29, 1868), 15 Stat. 635.

71. *Sioux Nation*, 448 U.S. at 424. Technically, the Court held that if it could be shown that the measure appropriately advanced tribal interests—by exchanging the taken land for property of

the broader doctrine that a subsequent statute can abrogate a treaty. In Indian law, the most that tribes can benefit from is a canon of interpretation that Congress's intent to abrogate must be express.[72] The trust doctrine/vested right limit on the anti-entrenchment rule, then, is not available under current doctrine to protect constitutive agreements between Congress and the tribes.[73] There is no reason to believe that a federal statute with a mutual consent clause would be treated differently.

To say that treaties and statutory consent clauses do not protect governing arrangements from subsequent change is not to say that tribal sovereignty might not be entrenched under another theory. The argument I want to press is that Congress and the tribes should be able to put constitutive arrangements beyond the reach of unilateral congressional action by establishing the relationship in a manner that resembles not ordinary politics, but higher lawmaking. The result of such processes may be said either to constitute a limited exception to anti-entrenchment principles or to constitute "mid-level lawmaking"—higher than normal lawmaking but below constitutional politics.[74]

This no doubt sounds foreign, but there are examples readily at hand. In the twentieth century, a number of territories of the United States established new relationships with Congress that may not be unilaterally altered: the Philippines was granted independence, and Hawaii and Alaska were admitted as states. These actions were not taken through the simple enactment of a statute. Each case involved a multi-year process, with actions by the people of the territories as a whole (not just their legislatures). Hawaiian statehood was the product of lengthy deliberation and bipartisan support. More than twenty congressional hearings over a twenty-five-year period considered the issue, and statehood legislation, originally introduced in 1919, passed the House in 1947, 1950, and 1955.[75] Both the Eisenhower and Truman administrations supported statehood for Hawaii.[76] The process for admission required congressional approval of a constitution drafted by the territory. Hawaii had convened a constitutional convention in 1950, whose members were popularly elected.[77] The convention's draft constitution was submitted by plebiscite to the people of the territory, who

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equivalent value—then the federal statute would not trigger the Just Compensation Clause. *See id.* at 371.

72. *Felix S. Cohen's Handbook of Federal Indian Law*, *supra* n. 3, at 222-23; *Menominee Tribe*, 391 U.S. 404.

73. A contrary view is expressed in a 1963 memorandum of the Department of Justice's Office of Legal Counsel regarding a "mutual consent" provision in a proposed United States-Puerto Rico compact. The memorandum concludes that federal legislation could constitutionally create "vested rights of a political nature" that could not be taken back without mutual agreement of the United States and Puerto Rico. *See* Memo. from Off. Leg. Counsel, U.S. Dept. of Justice, *Power of the United States to Conclude with the Commonwealth of Puerto Rico a Compact Which Could Be Modified Only by Mutual Consent* (July 23,1963) (copy on file with U.S. Dept. of Justice).

74. I am adopting Bruce Ackerman's terms of "normal lawmaking" and "higher lawmaking/constitutional politics." *See* Bruce Ackerman, *We the People: Foundations* 6-7 (Belknap Press of Harv. U. Press 1998).

75. Sen. Rpt. 86-80, at 5-6 (March 5, 1959).

76. *Id.*

77. *Id.* at 2-3.

approved the constitution by more than a three-to-one margin.[78] Congress proposed several minor amendments to the constitution,[79] and the document was again submitted to the people of Hawaii for approval.[80] Following a favorable vote in the territory, Hawaii was admitted to the Union.

Philippine independence was secured in a similar fashion. From the beginning of United States authority over the Philippines in 1898, it was understood that independence was the ultimate goal. Following federal legislation in 1934,[81] the Philippine legislature provided for the election of delegates to a constitutional convention, which drafted a Constitution for the Commonwealth of the Philippine Islands. The Constitution was approved by President Roosevelt and by popular plebiscite.[82] A commonwealth was to be established for ten years to provide a transition to independence.[83] Although Japanese occupation during World War II interrupted the process, the Philippines gained independence on July 4, 1946. The admission of Hawaii and Alaska as states, and the independence of the Philippines were products of federal legislation, but no one supposes that the political changes wrought by the legislation could be undone by a subsequent Congress.

Arrangements with the tribes seem somehow less permanent than either admitting states or granting independence to territories. Just as the omission of immigrants is commonly seen as a way-station to the full membership of citizenship, and territorial governments have been viewed as preparing a territory for eventual statehood, so too the "dependent sovereignty" of the tribes might be seen as a status leading ultimately toward something more permanent.[84] In the early days of Indian policy, the "solution" was removal of the tribes to areas beyond white settlement (or extermination); in later days, it was the breakup of the reservations and assimilation. There is, however, no obvious reason why a formal agreement recognizing self-determination should be viewed as an inappropriate long-term arrangement between the tribes and the federal government—except that we are accustomed to thinking in other categories.

If such arrangements are the product of deliberative and consensual processes, the values protected by the anti-entrenchment doctrine are not at risk. Consider how an agreement between the tribes and the government might be reached: the parties negotiate a compact that recognizes the sovereignty of the tribe within designated boundaries; any limits on tribal authority are made explicit; the tribe and Congress expressly approve the agreement; and the agreement provides that it cannot be altered without the consent of both parties.

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78. *Id.*
79. *Act of March 18, 1959*, Pub. L. No. 86-3, §7, 73 Stat. 4 (1959).
80. The process is described in detail in Sen. Rpt. 86-80.
81. *Act of March 24, 1934*, Pub. L. No. 73-127, 48 Stat. 456 (1934).
82. H.R. Doc. 74-144. (Mar. 25, 1935).
83. 48 Stat. at 463.
84. *See* Justice McLean's statement in his *Worcester v. Georgia* concurrence: "The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary." 31 U.S. 515, 593 (1832) (McLean, J., concurring).

Under such circumstances, unilateral abrogation of the agreement would undermine the democratic self-rule the agreement is designed to establish. Moreover, the ratification of the agreement by the people of the tribe moves the agreement out of the category of ordinary legislation.[85] The act of the people signifies a higher form of lawmaking, similar to the ratification of a constitution.

The framers of the United States Constitution understood the importance of popular ratification. The Constitution drafted in 1787 went far beyond the terms under which the Philadelphia Convention had assembled. Moreover, it included provisions that would encroach on existing state prerogatives. Madison recognized that a "higher Sanction than the Legislative authority" would be necessary if the Constitution and ensuing federal laws were to be viewed as legitimate and superior to state laws.[86] Popular ratification could supply that "sanction." According to historian Jack Rakove, Madison believed that "[p]opular ratification provided more than a symbolic affirmation of popular sovereignty; it promised to render the constitution legally superior to ordinary acts of government that also expressed popular consent through mechanisms of representation."[87] Ultimately, the Constitution drafted in Philadelphia included a self-referential provision stating that it would come into force when approved by "Conventions of nine states"—a formulation that expressly rejected other proposals that state legislative approval could suffice.[88]

Rakove concludes that:

> the resort to popular sovereignty . . . marked the point where the distinction between a constitution and ordinary law became the fundamental doctrine of . . . political thinking. . . .
>
> Whatever else might be said about the legality or illegality of [the] process, it produced a completely unambiguous result that ensured that the Constitution would attain immediate legitimacy.[89]

Tribal ratification is not a precise analogue because it involves popular participation by only one of the parties. It may therefore be argued that whatever meaning it has for the tribe, it cannot provide an exception to the nonentrenchment doctrine that would bind the people of the United States. The argument would carry weight if we were to reduce entrenchment to a specific formula—for example, that it can occur only if approved in a particular manner by the electorate and elected representatives. But it is unclear where such particular rules would come from. The claim here is less rigid: it is that certain constitutive arrangements, when adopted in a manner that goes beyond simple lawmaking on

85. Anupam Chander, Student Author, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 Yale L. J. 457 (1991).

86. Quoted in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 100 (Knopf 1996).

87. *Id.* at 101. *See* Ackerman, *supra* n. 74, at 169-75; *The Federalist No. 40* (James Madison).

88. *See* Rakove, *supra* n. 86, at 105.

89. *Id.* at 130. *See McCulloch v. St.*, 17 U.S. 316, 377-78 (1819).

behalf of a people who expressly approve the structure, can establish binding commitments.

Furthermore, the agreement is likely to be the product of a careful and lengthy negotiation, perhaps involving the actions of several Congresses. Because the negotiations are over constitutive arrangements, the risk that "ins" would attempt to lock in particular policies (self-serving or not) seems minimal. This is not to deny that long-term structural policies could be viewed in partisan terms (consider statutes attempting to entrench rules on campaign contributions or voting requirements), but it is hard to see partisan considerations playing an important role in the negotiation of federal government-tribe agreements that define a form of government for the tribe.

There is an additional consideration that removes constitutive arrangements from the usual kind of legislation subject to the anti-entrenchment rule. Sovereign arrangements demand a certain security if the governments they establish are to flourish. (This idea receives recognition in Article V of the Constitution, which establishes a difficult-to-mobilize amendment process.) Long-term planning—for economic growth, resource management, and education—and public participation may suffer if governing structures are subject to alteration by another authority. In repudiating the tribal termination policy of the 1950s, the Nixon administration recognized that "the mere threat of termination tends to discourage greater self-sufficiency among Indian groups."[90] This point may be generalized. Meaningful self-determination needs a fence around constitutive arrangements, providing a spatial and temporal independence that can inculcate commitment and long-term vision within a *demos*.

It is therefore not surprising that the compacts with the Federated States of Micronesia and the Commonwealth of the Northern Mariana Islands include provisions stating that the agreements cannot be modified without the consent of both parties.[91] That these provisions be understood as binding is of significant importance to the populations of the polities recognized by the agreements. In earlier days, the executive branch took the position that the mutual consent provisions were binding on the federal government; and two opinions issued by the Justice Department's Office of Legal Counsel ("OLC") took a similar position. (One of the opinions was issued by then-Assistant Attorney General William Rehnquist.)[92]

More recently, the OLC has opined that mutual consent provisions are not outside the general rule of nonentrenchment. The issue has arisen in the negotiations with Guam over a new commonwealth status. A draft Guam Commonwealth Act[93] included two such provisions: one declaring that the Act

90. Richard M. Nixon, *Special Message to the Congress on Indian Affairs*, 1970 Pub. Papers 564, 567.

91. *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, Pub. L. No. 94-241, § 105, 90 Stat. 263, 264 (1976); *Compact of Free Association Act of 1985*, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (published as a note to 48 U.S.C. § 1681 (1987)).

92. *See* Memo., *supra* n. 67, at 2 n. 2.

93. H.R. 1521, 103d Cong. (1993).

would not be amendable without the consent of both governments, the other stating that no federal laws or regulations adopted after enactment of the Act would be applied to Guam without the mutual consent of Guam and Congress.[94] A 1994 OLC opinion concluded that the provisions were unenforceable and that their inclusion in the Act could create "illusory expectations that might . . . mislead the electorate of Guam about the consequences of the legislation."[95] With wooden logic and language, the opinion adopts a categorical approach: "The plenary authority of Congress over a non-state area persists as long as the area remains in that condition and terminates only when the area becomes a State or ceases to be under United States sovereignty. There is no intermediary status as far as the Congressional power is concerned."[96] The ground for this conclusion is nearly an *ipse dixit*: it is declared that the power of Congress to delegate governmental powers to "non-state areas" is "contingent on the retention by Congress of its power to revise, alter, and revoke that legislation."[97] This conclusion is said to be "but a specific application of the maxim that one Congress cannot bind a subsequent Congress."[98]

The opinion does not reason to this result. It does not consider alternative formulations or the possibility that constitutive arrangements might call forth a different rule. The Justice Department recognizes that Congress's power to amend earlier legislation is limited by the Constitution's Contracts and Due Process Clauses but holds that these guarantees do not apply because "a specific political relationship" cannot be considered a form of protected property.[99] That may well be correct, but it hardly ends the discussion. The question is whether there are good grounds for holding that governing arrangements—popularly ratified—are not subject to the nonentrenchment doctrine. That question is not answered by a conclusion that such arrangements are not "property."

Whatever merit the OLC opinion may have as to territories, it would have even less force if applied to tribal governments. As noted, the inherent authority of the tribes is not a product of congressional delegation; recognition of tribal sovereignty was thus not—in the words of the OLC opinion—accompanied by a reserved power of Congress to revoke or amend. Such reserved authority might be justified if territorial government is viewed as inherently nonpermanent, but that reasoning cannot apply to tribal sovereignty in the era of self-determination. James Anaya has summarized the evolving international law norms on constitutive arrangements for indigenous peoples:

> The world community now holds in contempt the imposition of government structures upon people, regardless of their social or political makeup. . . . Today, procedures toward the creation, alteration or territorial extension of

94. *Id.* at §§ 103, 202.
95. Memo., *supra* n. 67.
96. *Id.* at 6.
97. *Id.* at 5.
98. *Id.* at 6.
99. *Id.* at 7-10.

governmental authority normally are regulated by self-determination precepts requiring minimum levels of participation on the part of all affected peoples commensurate with their respective interests.[100]

IV. CONCLUSION

It is time to take stock. I have examined a range of arguments for constitutional limits on Congress's plenary power over Indian tribes, including claims that the right of self-government is constitutionally protected. I have attempted to provide an additional argument as to how and why constitutive arrangements that are the product of deliberative processes and tribal popular approval might be protected against subsequent congressional alteration. If the argument is persuasive, it would supply a limit on congressional plenary power, even if other constitutionally based claims prove unsuccessful. And it would undercut the congressional unilateralism approved in *Lone Wolf* a century ago.

100. Anaya, *supra* n. 15, at 82. *See* Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. Mich J. L. Ref. 899, 946-48 (1998).